

No. 15,973

In the

United States Court of Appeals

*For the Ninth Circuit*

MILDRED BECKER SCHULTZ,

*Appellant,*

vs.

CARL HOEFLE and DELMAR S. PORTER, individually and as copartners d.b.a. TUNE TOWNE TUNES; CAPITAL RECORDS, INC.; CAPITAL RECORDS DISTRIBUTING CORP.; HILL AND RANGE SONGS, INC.; RUMBA-  
LERO MUSIC, INC.; BROADCAST MUSIC, INC.; DECCA RECORDS, INC.; LOEW'S INCORPORATED; RADIO CORPORATION OF AMERICA; and COLUMBIA RECORDS, INC.,

*Appellees.*

Appellant's Opening Brief

CARL HOPPE

JAMES F. MITCHELL

2610 Russ Building  
San Francisco 4, California

THOMAS P. MAHONEY

4055 Wilshire Boulevard  
Los Angeles 5, California

*Attorneys for Appellant*

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*Appellees.*

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**Appellant's Opening Brief**

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This is a civil action for copyright infringement. The United States District Court for the Southern District of California, Central Division, the Honorable Thurmond Clarke, District Judge, presiding, dismissed the complaint after a trial on the merits. Plaintiff appeals from the judgment of dismissal.

## **JURISDICTION**

Issue was joined in the District Court upon an Amended Complaint (R. 3-8) and the several answers of the several defendants (R. 8-53).

The Amended Complaint charges the defendants with infringing the plaintiff's registered copyrights for musical compositions (R. 4-6). The District Court had jurisdiction of the cause under U. S. Code, Title 28, Section 1338 (R. 4, 60).

The judgment or final decision of the District Court was entered January 8, 1958 (R. 61-63). Plaintiff filed her notice of appeal on February 6, 1958 (R. 64) within 30 days after entry of the final decision. This Court has jurisdiction of the appeal under U. S. Code, Title 28, Sections 1291 and 2107.

## **STATEMENT OF THE CASE**

### **Questions Presented.**

The critical questions presented by this appeal are:

1. Where there is no direct evidence of access in a copyright infringement action, is not infringement of a musical copyright proved by a combination of the following circumstances:

(a) Undisputed evidence that there was an ample opportunity for access in many places of public entertainment in a single state;

(b) Undisputed evidence that the putative infringements utilize a substantial number of bars based upon a generally well known musical triad but having a peculiar identity of position of notes within the bar and timing of notes found earlier in the copyrighted music; and

(c) Undisputed evidence that the prior art music found in the public domain fails to disclose the identical peculiar



position of notes within the bar and timing of notes found in common only in the putative infringements and in the earlier copyrighted music?

2. Where there is evidence that the alleged infringing music as an entirety does not follow the complete form of the copyrighted music, is not infringement proved by undisputed evidence showing the repetitive use in the alleged infringing music of a bar substantially identical to the principal bar of the copyrighted music and of variations and modulations of that bar?

Plaintiff on this appeal develops the record basis for said questions and contends that both questions should be answered in the affirmative.

### **The Proceedings Below.**

The District Court found that plaintiff is the owner of valid subsisting copyrights on her musical compositions "Good Old Army" (Pl. Exh. 2, Exh. Bk. 1-2) and "Waitin' For My Baby" (Pl. Exh. 5, Exh. Bk. 7-8). The pertinent findings of fact are:

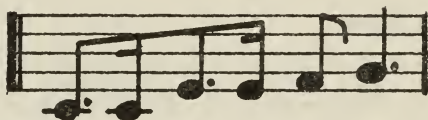
"2. Prior to April 7, 1941, plaintiff composed the words and music of a musical composition entitled 'Good Old Army' and subsequently applied for and received from the United States Register of Copyrights a certificate of copyright (unpublished) on said composition, bearing No. E 254497, dated April 7, 1951 [1941]." (R. 56)

"3. Prior to July 7, 1949, plaintiff adapted the music of said 'Good Old Army,' composed different words, and entitled the words and music of said musical composition 'Waitin' For My Baby,' and subsequently applied for and received from the United States Register of Copyrights a certificate of copyright (unpublished) on said composition bearing No. E 172341, dated July 7, 1949." (R. 56)

"4. Plaintiff is sole and exclusive owner of said compositions, 'Good Old Army' and 'Waitin' For My Baby,' insofar as said compositions may be subject to exclusive ownership, as hereinafter provided." (R. 56)

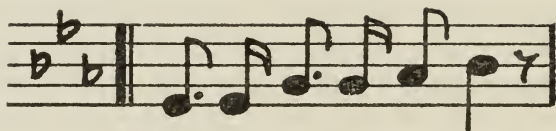
In considering the plaintiff's musical composition, the particular attention of the Court is called to what hereinafter will be referred to as the Schultz figure. This figure forms the basis for the plaintiff's contention, developed later in this brief, that the defendants have infringed her copyrights.

In "Good Old Army," the Schultz figure appears in a natural key, C major, in the first bar of a 32-bar chorus as follows:



In "Good Old Army," the Schultz figure shown above is used without variation in bars 1 and 2 of the chorus and is used with variations in bars 9, 10, 25 and 26 (Pl. Exh. 2, Exh. Bk. 1). The experts for the defendants have referred to this figure as being a do-mi-sol triad with a passing note (R. 171, 207-208).

In "Waitin' For My Baby" the Schultz figure appears in three flats, in the key of E flat major, and is used in the first bar of a 32-bar chorus as follows:

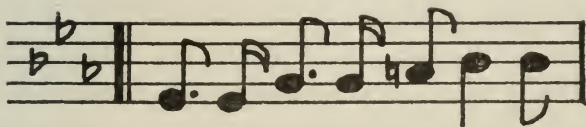


The exhibit, speaking for itself, discloses that the foregoing Schultz figure is identical with the Schultz figure of "Good Old Army" with the exceptions (1) that the entire

figure is transposed two notes upwardly to accommodate the change in key from the natural key, C major, to the key of E flat major, and (2) that the last note of the Schultz figure in "Good Old Army" has a dotted 1/4th value (3/8) whereas that in "Waitin' For My Baby" has a value of 1/4th and is followed by a 1/8th rest, making a total time value of 3/8 for the two factors. The Schultz figure appears in bars 1 and 25 of the chorus in "Waitin' For My Baby" without change and variations of it appear in bars 2, 9, 10 and 26 (Pl. Exh. 5, Exh. Bk. 7).

After the plaintiff obtained her copyrights on her music incorporating the Schultz figure, the several defendants published a popular song entitled "The Blacksmith Blues" (Pl. Exh. 8, Exh. Bk. 13-16). The defendants all admit that they have caused "The Blacksmith Blues" to be published and sold (R. 10, 14, 22-23, 28, 32, 39, 45 and 49). An earlier version of the music of "The Blacksmith Blues" was produced and copyrighted under the title "Happy Pay Off Day" (see Pl. Exh. 8, Exh. Bk. 14). In this brief, plaintiff refers to the music of "The Blacksmith Blues" as comprehending the same music, regardless of the actual title under which it was published.

It is the contention of the plaintiff that this music uses the Schultz figure in violation of the plaintiff's copyrights. In "The Blacksmith Blues," the putative infringement appears in three flats, in the key of E flat major, and is used in the first bar of a 16-bar chorus as follows:



The exhibit, speaking for itself, discloses that the putative infringing figure is used with variations in bars 3, 5,

7, 9, 11, 13 and 15 of "The Blacksmith Blues" (Pl. Exh. 8, Exh. Bk. 14 and 15). One of the time variations consisting of 3/16: 1/16: 3/16: 1/16: 1/8: 3/8 used in bar 5 of "The Blacksmith Blues" was used earlier in bars 1 and 2 of "Good Old Army" and in bar 9 of "Waitin' For My Baby." The variation of connecting the passing note and the sol component by a slur as used in bar 13 of "The Blacksmith Blues" was used earlier in bar 9 of "Waitin' For my Baby."

The exhibits, speaking for themselves, disclose the following similarities between the copyrighted bar and the putative infringing bar (R. 186-187).

GOOD OLD ARMY		WAITIN' FOR MY BABY		THE BLACKSMITH BLUES	
Pitch	Value	Pitch	Value	Pitch	Value
do	3/16	do	3/16	do	3/16
do	1/16	do	1/16	do	1/16
mi	3/16	mi	3/16	mi	3/16
mi	1/16	mi	1/16	mi	1/16
fa	1/8	fa	1/8	fe	1/8
sol	3/8	sol	1/4	sol	1/4
		rest	1/8	sol	1/8

A further similarity between the two songs is that each uses the triad for the same purpose. Plaintiff uses her Schultz figure repetitively as a two bar statement in bars 1 and 2, bars 9 and 10, and bars 25 and 26 (R. 236-237, 243-244) and follows the figure with a two bar "kind of little answer" to the statement bars (R. 237). Defendants also use the figure as a repetitive statement, but as a one bar statement in bars 1, 3, 5, 7, 9, 11, 13 and 15 (R. 237, 244) and follow the figure with a one bar answer (R. 237). Thus throughout both songs, the Schultz figure and its variations are used in all of the statements (R. 246-247).

At the trial, the plaintiff was unable to produce any direct evidence that the defendants had ever seen or copied her music. But in the argument which follows, the plaintiff



will urge that the striking novelty of the Schultz figure, and the similarities between the putative infringing bars and the Schultz figure, as well as other evidence, establishes by the weight of circumstances the irrefutable conclusion that the putative infringing bars were copied from the Schultz figure and that they had no other source. The District Court ruled to the contrary and made the following pertinent findings of fact (R. 56-59):

"5. Jack Holmes composed the words and music of the original musical compositions entitled 'Happy Pay Off Day' and 'The Blacksmith Blues.' Certificates of copyright on said 'Happy Pay Off Day' and 'The Blacksmith Blues' were applied for and issued by the United States Register of Copyrights."

"10. Plaintiff did not submit a copy of her compositions, or either of them, to Jack Holmes or to defendants, or any of them, prior to Jack Holmes' composition of 'Happy Pay Off Day' and 'The Blacksmith Blues,' as aforesaid."

"11. It is not true that Jack Holmes, or defendants, or any of them, had ever seen a copy, or heard a performance of plaintiff's compositions, or either of them, or in any other way were aware of the existence of plaintiff's composition prior to Jack Holmes' composition of 'Happy Pay Off Day' and 'The Blacksmith Blues,' as aforesaid."

"12. The first measure of 'Happy Pay Off Day' and of 'The Blacksmith Blues' utilizes some notes in common with the notes of the opening measures of 'Good Old Army' and 'Waitin' For My Baby'; insofar as such musical material in 'Happy Pay Off Day' and 'The Blacksmith Blues' bears any similarity to 'Good Old Army' or 'Waiting' For My Baby,' such musical material was not copied or prepared from plaintiff's compositions. The common utilization by different compositions of a few notes such as herein found to exist

occurs frequently in the field of popular music, particularly because of the limited number of pleasing tonal combinations within the average person's range of voice and skill."

"13. There are differences in the first measure of 'Happy Pay Off Day' and 'The Blacksmith Blues,' compared to the corresponding measures of 'Good Old Army' and 'Waitin' For My Baby'; these differences are apparent in each instance in which the musical material contained in said first measures appears elsewhere in said musical compositions. Among these differences are the use of a different passing tone between the mi and sol components of the triad upon which said first measures are constructed, and the fact that plaintiff's compositions contain a rest on the last half of the final count of their respective first measures whereas Jack Holmes' compositions do not."

"14. Because of these differences, the first measures of the respective compositions of plaintiff and Holmes, when performed, convey to the average listener, as well as to a person skilled in music, a substantially different musical sound, feeling and impression."

"15. The construction, modulations, phrasing, musical notes, and other musical material contained in 'Happy Pay Off Day' and 'The Blacksmith Blues' are not similar to that of 'Good Old Army' and 'Waitin' For My Baby.'"

"16. A performance of either 'Good Old Army' or 'Waitin' For My Baby' does not convey or give an impression to the average listener, of similarity or resemblance to 'Happy Pay Off Day' or 'The Blacksmith Blues,' in any particular or taken as a whole."

"17. Neither all of 'Happy Pay Off Day' or 'The Blacksmith Blues,' nor any part thereof, was copied or prepared from 'Good Old Army' or 'Waitin' For My Baby,' or any part thereof."

“18. It is not true that Jack Holmes or defendants, or any of them, have used the results of plaintiff's labors and incorporated the results thereof in ‘Happy Pay Off Day’ or ‘The Blacksmith Blues’ by the publishing, selling, and otherwise marketing of said compositions.”

The District Court thereupon entered its Conclusions of Law (R. 60) and its Judgment accordingly (R. 61-63). This appeal followed.

### **SPECIFICATION OF ERRORS**

1. The District Court erred in ordering, adjudging and decreeing that plaintiff, Mildred Becker Schultz, take nothing by her amended complaint herein.

2. The District Court erred in ordering, adjudging and decreeing that defendants have judgment for their costs of suit.

3. The District Court erred in finding that Jack Holmes composed the music of the compositions entitled “Happy Pay Off Day” and “The Blacksmith Blues” (Finding of Fact No. 5).

4. The District Court erred in finding that the musical compositions “Happy Pay Off Day” and “The Blacksmith Blues” were original with Jack Holmes (Finding of Fact No. 5).

5. The District Court erred in finding defendants herein, other than Jack Holmes, originally named as a defendant, are licensees and/or assignees of certain rights to publish, publicly perform for profit, record and distribute phonograph recordings of, and otherwise exploit, said “Happy Pay Off Day” and “The Blacksmith Blues” (Finding of Fact No. 6).

6. The District Court erred in finding that plaintiff did not submit a copy of her compositions, or either of them.

to Jack Holmes or to defendants, or any of them, prior to Jack Holmes' composition of "Happy Pay Off Day" and "The Blacksmith Blues," as aforesaid (Finding of Fact No. 10).

7. The District Court erred in finding that it is not true that Jack Holmes, or defendants, or any of them, had ever seen a copy, or heard a performance of plaintiff's compositions, or either of them, or in any other way were aware of the existence of plaintiff's compositions prior to Jack Holmes' composition of "Happy Pay Off Day" and "The Blacksmith Blues," as aforesaid (Finding of Fact No. 11).

8. The District Court erred in failing to find that plaintiff did disseminate her musical composition widely for purposes of consideration among musicians, arrangers, publishers and others in the musical industry.

9. The District Court erred in failing to find that defendants, and each of them, received copies of her musical composition.

10. The District Court erred in finding that insofar as musical material in "Happy Pay Off Day" and "The Blacksmith Blues" bears any similarity to "Good Old Army" or "Waitin' For My Baby," such musical material was not copied or prepared from plaintiff's compositions (Finding of Fact No. 12).

11. The District Court erred in finding that the common utilization by different compositions of a few notes such as herein found to exist occurs frequently in the field of popular music, particularly because of the limited number of pleasing tonal combinations within the average person's range of voice and skill (Finding of Fact No. 12).

12. The District Court erred in finding that, because of differences set forth in Finding 13, the first measure of the respective compositions of plaintiff and Holmes, when



performed, convey to the average listener, as well as to a person skilled in music, a substantially different musical sound, feeling and impression (Finding of Fact No. 14).

13. The District Court erred in finding that the construction, modulations, phrasing, musical notes, and other musical material contained in "Happy Pay Off Day" and "The Blacksmith Blues" are not similar to that of "Good Old Army" and "Waitin' For My Baby" (Finding of Fact No. 15).

14. The District Court erred in finding that a performance of either "Good Old Army" or "Waitin' For My Baby" does not convey or give an impression to the average listener, of similarity or resemblance to "Happy Pay Off Day" or "The Blacksmith Blues," in any particular or taken as a whole (Finding of Fact No. 16).

15. The District Court erred in finding that neither all of "Happy Pay Off Day" or "The Blacksmith Blues," nor any part thereof, was copied or prepared from "Good Old Army" or "Waitin' For My Baby," or any part thereof (Finding of Fact No. 17).

16. The District Court erred in finding that it is not true that Jack Holmes or defendants, or any of them, have used the results of plaintiff's labors and incorporated the results thereof in "Happy Pay Off Day" or "The Blacksmith Blues," by the publishing, selling, and otherwise marketing of said compositions (Finding of Fact No. 18).

17. The District Court erred in failing to find that Jack Holmes, alias Charles Douglas Hone, copied from plaintiff's copyrighted compositions "Good Old Army" or "Waitin' For My Baby" or from both of them when he wrote the music of the musical compositions entitled "Happy Pay Off Day" and "The Blacksmith Blues."

18. The District Court erred in failing to find that defendants, and each of them, used the results of plaintiff's

labors and incorporated such results in the infringing musical compositions "Happy Pay Off Day" and "The Blacksmith Blues."

19. The District Court erred in concluding that neither of the compositions, "Happy Pay Off Day" nor "The Blacksmith Blues," are infringements upon plaintiff's compositions "Good Old Army" or "Waitin' For My Baby" (Conclusion of Law No. II).

20. The District Court erred in failing to conclude that the compositions "Happy Pay Off Day" and "The Blacksmith Blues" are both infringements upon plaintiff's compositions "Good Old Army" and "Waitin' For My Baby."

21. The District Court erred in concluding defendants herein are not guilty of having engaged in unfair trade practices or unfair competition by their having published, sold, and otherwise marketed the compositions, "Happy Pay Off Day" and "The Blacksmith Blues" (Conclusion of Law No. III).

22. The District Court erred in concluding that defendants are entitled to judgment herein for their costs of suit incurred herein (Conclusion of Law No. IV).

23. The District Court erred in failing to find that plaintiff is entitled to judgment as prayed in the Amended Complaint filed March 18, 1955.

### **SUMMARY OF ARGUMENT**

In the argument plaintiff urges that Rule 52 does not preclude review of the findings of fact in this case because the controlling evidence is documentary and speaks for itself; the evidentiary facts are not in conflict or dispute; the answers to the questions presented do not turn upon the truth or falsity of the testimony of the witnesses and the only real issue is the ultimate legal conclusion to be drawn from the undisputed documentary evidence.

Plaintiff concedes in the argument that there can be no infringement of a copyright in the absence of actual copying and that there is no direct evidence that any of the defendants or their privies ever had actual access to plaintiff's works or that defendants or any of their privies actually copied any of the plaintiff's works.

Plaintiff argues that this lack of direct evidence is amply met by the circumstantial evidence in this case leading only to the sound conclusion that plaintiff's works were actually copied in producing the putative infringements. The undisputed evidence in this record discloses that there was an ample opportunity for copying because the works of plaintiff were publicly performed at a number of entertainment places in San Francisco and that the circulation of plaintiff's works extended to the Los Angeles area, where the defendants' works were first published, as well as elsewhere. The undisputed evidence further shows that there are a number of peculiarities in plaintiff's music which are reproduced verbatim in the alleged infringements. Finally the undisputed evidence discloses that no prior art music in the public domain supplies a source for all of the peculiarities found in common in the plaintiff's music and the defendants' music.

Plaintiff then argues as a matter of law that these undisputed facts establish internal circumstantial evidence of copying and that the courts accept such evidence as convincing proof of copying with consistent regularity in all forms of copyright infringement actions.

Plaintiff next turns to the specific findings of fact of the District Court and shows that they are clearly erroneous in part because they are without any evidentiary support and in part because they are based upon a misapprehension of the law.

Following the development of these points, plaintiff argues that the District Court should have entered judgment of infringement and should have awarded an accounting of damages and profits and asks this Court to reverse the judgment of the District Court and to direct the District Court to enter judgment for plaintiff.

### ARGUMENT

#### **Rule 52 Does Not Preclude Review of the Findings of Fact in This Case.**

At the outset, the plaintiff must face the effect of Rule 52 of the Federal Rules of Civil Procedure on the scope of this Court's review of the findings of fact in this case. Rule 52(a) provides in part:

“(a) Effect. In all actions tried upon the facts without a jury \* \* \*, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; \* \* \* Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. \* \* \*”

The pertinent rule of review is announced in *United States v. Gypsum Co.* (1948), 333 U.S. 364, at page 395:

“\* \* \* A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”

In the case at bar it will appear that there is no question as to the credibility of the witnesses. So far as the oral testimony of the plaintiff is concerned, she was her only witness and no effort was made to impeach any of her testi-



mony. So far as the oral testimony of the defendants is concerned, its material and relevant portions consisted entirely of expert testimony expository of the documentary evidence. The balance of the evidence consists of documentary evidence which speaks for itself. As to it, this Court has a well recognized and established right to draw its own conclusions.

In *Kuhn v. Princess Lida of Thurn & Taxis* (3rd Cir. 1941), 119 F.2d 704, the rule is said to include the following power, page 706:

“\* \* \* Where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review of the trial court’s action. (citations omitted) An incorrect conclusion by a trial court qualifies as a ‘clearly erroneous’ finding, for the correction whereof on appeal Rule 52(a) specifically provides.”

The foregoing rules have an especial force in patent, trademark and copyright cases because in such cases the underlying evidence is usually documentary and the oral testimony is merely expository of the documents.

In an analogous patent case, Judge Stephens speaking for this Court in *Wire Tie Mach. Co. v. Pacific Box Corporation* (9th Cir. 1939), 102 F.2d 543 said at page 552:

“\* \* \* As a general rule this court will not overturn the findings of fact of the trial judge, since he has had an opportunity of hearing the witnesses testify and is in a better position than this court to judge their veracity. However, in a case such as the case at bar, the question of whether or not the subject matter constitutes invention does not turn upon the truth or falsity of the testimony of the witnesses. Their testimony of necessity is as to their opinions of whether it required more than mechanical skill to effect the combination of parts.”

In *Soy Food Mills v. Pillsbury Mills* (7th Cir. 1947), 161 F.2d 22, the rule on review is stated as follows, page 25:

“We are of the opinion that not only is the factual question thus open to the appellate court, but it is our unavoidable duty to examine the two trade-marks or trade-names or copyrights and decide the question of fact for ourselves. We must, however, give to the District Court’s opinion on such issues, consideration and weight because of its source.”

On the specific issue of copying and improper appropriation a pertinent dictum in *Arnstein v. Porter* (2nd Cir. 1946), 154 F.2d 464, states, page 469:

“Each of these two issues—copying and improper appropriation—is an issue of fact. If there is a trial, the conclusions on those issues of the trier of the facts—of the judge if he sat without a jury, or of the jury if there was a jury trial—bind this court on appeal, provided the evidence supports those findings, regardless of whether we would ourselves have reached the same conclusions. But a case could occur in which the similarities were so striking that we would reverse a finding of no access, despite weak evidence of access (or no evidence thereof other than the similarities); and similarly as to a finding of no illicit appropriation.”

The powers of review which this Court and other reviewing courts have announced as shown above are confirmed by U. S. Code, Title 28, Section 2106:

“The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.”

The plaintiff now will demonstrate to this Court that the foregoing rules are applicable to the review of the record at bar. As a prelude to the specific errors claimed at bar, the plaintiff turns to the salient portions of the case to establish a proper foundation for the argument.

### **Preliminary Chronology of Facts.**

In considering the circumstances, a preliminary chronology of facts may be helpful:

#### *April 7, 1941:*

Plaintiff obtained copyright registration for "Good Old Army" (Finding 2, R. 56). Plaintiff then "plugged" 500 copies of a piano arrangement of her tune in San Francisco night clubs and entertainment places (Pl. Exh. 3, Exh. Bk. 3-6, R. 82-90).

#### *May 29, 1942:*

Westmore Music Corporation of Los Angeles offered plaintiff a publishing agreement and royalty contract on her song. (Pl. Exh. 12, Exh. Bk. 17). "Pals of the Golden West" offered to record her tune (Pl. Exh. 14, Exh. Bk. 18).

#### *July 7, 1949:*

Plaintiff obtained copyright registration on "Waitin' For My Baby" (Finding 3, R. 56).

Plaintiff "plugged" a piano arrangement of "Waitin' For My Baby" (Pl. Exh. 6, Exh. Bk. 9-12) in San Francisco and Los Angeles (R. 94-104).

#### *November 2, 1949:*

Leeds Music Corporation by Lou Levy returned the plaintiff's song to her (Pl. Exh. 15, Exh. Bk. 19).

*January 25, 1950:*

Charles Douglas Hone obtained copyright registration on "Happy Pay Off Day" (R. 302).

*April 17, 1950:*

Charles Douglas Hone obtained copyright registration on "Happy Pay Off Day" (R. 302).

*January, 1952:*

Hill and Range Songs, Inc. started to publish "The Blacksmith Blues" (Pl. Exh. 8, Exh. Bk. 13-16, R. 22-23).

*January, 1952:*

Loew's Incorporated began to publish Art Mooney's recording of "The Blacksmith Blues" (R. 37-38).

*January 7, 1952:*

Capital Records, Inc. produced Ella Mae Morse's recording of "The Blacksmith Blues" (R. 14).

*February, 1952:*

Decca Records, Inc. began to publish Bill Barnell's recording of "The Blacksmith Blues" (R. 32).

*February, 1952:*

Decca Records, Inc. began to publish Sy Oliver's recording of "The Blacksmith Blues" (R. 32).

*February, 1952:*

Radio Corporation of America began to publish Elton Britt's recording of "The Blacksmith Blues" (R. 43).

*February, 1952:*

Columbia Records, Inc. produced Harry James' and Tony Harper's recording of "The Blacksmith Blues" (R. 49).



*February, 1952:*

Columbia Records, Inc. produced Leon McAuliffe's recording of "The Blacksmith Blues" (R. 49).

*March 1, 1952:*

Bob Hamilton trio played "The Blacksmith Blues" on station KRON-TV (Finding 7, R. 57).

*April 19, 1952:*

"Your Hit Parade" performed "The Blacksmith Blues" on station KRON-TV (Finding 8, R. 57).

*May, 1952:*

Radio Corporation of America produced Ralph Flanagan's recording of "The Blacksmith Blues" (R. 43).

*November 17, 1952:*

Plaintiff through her then attorney George B. White complained to Capital Records, Inc. of infringement (R. 16). Hill and Range Songs, Inc. and Rumbalero Music, Inc. received copies of the George B. White correspondence (R. 22).

*December 1, 1952:*

Capital Records, Inc. produced Eddie Bergman's recording of "The Blacksmith Blues" (R. 14).

With this chronology plaintiff now develops the argument.

**Copyright Infringement Requires Copying.**

In considering the undisputed facts, the plaintiff is mindful that she has the burden to prove that the defendants

actually copied the Schultz figure in the composition of "The Blacksmith Blues." For if "The Blacksmith Blues" is an independent work, it cannot be an infringement. The rule is stated tersely in *Mazer v. Stein* (1954), 347 U.S. 201, at page 218:

"\* \* \* Absent copying there can be no infringement of copyright. \* \* \*"

The plaintiff has conceded above, this brief page 6, that there is no direct evidence of copying. In the following portions of this brief, the plaintiff proposes to prove the fact of copying by the uncontroverted circumstantial evidence.

### **The Record Discloses Opportunity for Copying.**

One of the first essentials to copying a copyrighted work is that the alleged infringer must have had access to the work, for without access he would have had no opportunity for copying. In the case at bar, there is no direct evidence of access, but there is an abundance of evidence that the plaintiff produced and distributed enough copies of her work in the State of California to make the likelihood of access more than a mere possibility.

Without dispute it appears that the plaintiff printed 500 copies of a piano arrangement of "Good Old Army" (Pl. Exh. 3, Exh. Bk. 3-6; R. 79-80, 82). She took these copies every place she saw a band to see if she could plug it and create a demand (R. 83). She took her song to a number of places in San Francisco, including the Golden Gate Theatre, where she showed it to Maxine Andrews of the Andrews Sisters (R. 83-85); to the Lion's Den, where the piano player played it (R. 86); to the Forbidden City, where the arranger made an orchestration and the orchestra played it (R. 86); to the 365 Club, where the orchestra played it (R. 87); to the Seven Seas, where a marimba band played it (R. 87); to Monaco's, where Melba, an organist, played

it (R. 88) and to the Riviera, where June, an organist, played it (R. 88).

The parties stipulated that the plaintiff would testify that she took this music around to a number of the night spots and bars, and restaurants in the nature of bars and night clubs, and showed it to people there who played it and to some who didn't, and that it was played at a number of night clubs and night spots in San Francisco in 1941 (R. 88-89). Although the stipulation did not bind defendants to the facts, no effort was made to discredit the stipulated testimony.

Following her 1949 copyright registration for "Waitin' For My Baby" (Finding 3, R. 56), the plaintiff obtained 20 photostatic copies of an arrangement of this piece (Pl. Exh. 6, Exh. Bk. 9-12). The plaintiff took this version of her song to various night spots and entertainers in San Francisco. Specifically, the plaintiff took it to the Black Hawk night club; to the Eastman Trio; to Doc Evans and his Chicagoans at the Hangover Club; to Lionel Hampton at the Edgewater; to Walt Nobriega at the Palace Hotel; to Jack Ross at the Cirque Room of the Fairmont Hotel; to Billy Eckstein at The Say When Club; to Bunny Peterson; and to Leo Killion, who wrote the Hut-Sut Song (R. 91-99, 102-103). Pete Peterson of the Vagabonds, a small performing orchestra, came to the plaintiff to get the music (R. 99).

The plaintiff also took the music to Hollywood, where she showed it to someone at the RCA Victor Building; to an unknown arranger; to Maxine Andrews of the Andrews Sisters (R. 99-101).

The record also discloses that the circulation of her song was not limited to the places stated.

The Westmore Music Corporation offered plaintiff a publishing agreement and royalty contract for "Good Old Army Blues" on May 29, 1942 (Pl. Exh. 12, Exh. Bk. 17).

Pals of the Golden West offered to make a recording of "Good Old Army Blues" for the plaintiff (Pl. Exh. 14, Exh. Bk. 18).

Leeds Music Corporation of Radio City, New York, had a copy of the music which they returned to the plaintiff on November 2, 1949 (Pl. Exh. 15, Exh. Bk. 19).

The record does not disclose that Jack Holmes, who wrote the words and music for "The Blacksmith Blues", was in any of the night clubs and other places when plaintiff's music was performed, but it does appear that the plaintiff's music was widely circulated in California and that "The Blacksmith Blues" was published at Beverly Hills, California (Pl. Exh. 8, cover page, Exh. Bk. 13).

This Court can take judicial notice of the fact that the Los Angeles and the San Francisco areas are closely connected, within twelve hours by train and within two hours by airplane. Hence, in the absence of other evidence, opportunity of access stands proved on this record.

Moreover, Jack Holmes was a singer by trade (see Pl. Exh. 9, the Capital record of "Happy Pay Off Day" which recites "Vocal by Jack Holmes"). It is natural that one of the "plugged" copies of the plaintiff's music should eventually find its way into his hands, particularly since the "plugging" was directed to the entertainment field, of which Jack Holmes was a part.

Plaintiff next shows that the similarity between the Schultz figure and the putative infringing bars is so unique that the latter contain their own internal evidence of copying.

### **Defendants' Music Contains Its Own Internal Evidence of Copying.**

Plaintiff has conceded above that there is no direct evidence that Jack Holmes had ever actually seen any of plaintiff's music before he published "The Blacksmith Blues."

Similarly, plaintiff does not contend that the mere fact that the record discloses opportunity of access, as discussed at pages 20 to 22 of this brief, *per se* establishes the fact of access. In this section of the brief plaintiff argues that the alleged infringing music contains such identity with respect to a number of peculiarities not found in any prior publications so as to warrant only the conclusion that Jack Holmes must have copied the Schultz figure in composing "The Blacksmith Blues."

In making this argument, plaintiff must concede that the do-mi-sol triad, either with or without a passing note, is a well known musical form dating back at least as early as the French Revolution. And plaintiff does not complain that defendants have used a public domain form of the old do-mi-sol triad with a passing note. This litigation centers ENTIRELY upon the plaintiff's peculiar form of the well known triad and upon defendants' copying of that peculiar form in the putative infringements.

*The Putative Infringing Bars and the Schultz  
Figure Have Common Peculiarities*

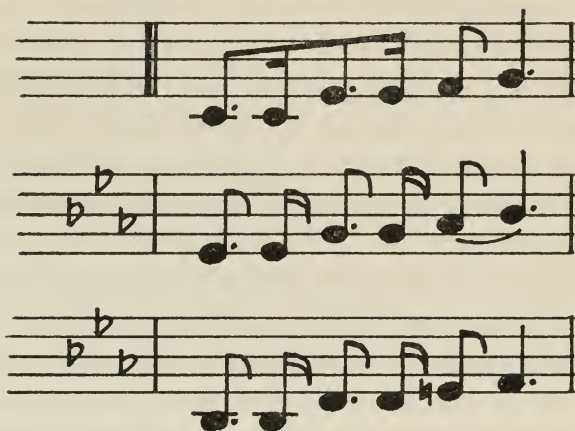
A preliminary comparison of the Schultz figure with the putative infringing first bar is made earlier in this brief at pp. 4-5. The documents, speaking for themselves, show but minor variations—one, the substitution of a fe for a fa as the passing note, and the other, the substitution of a  $\frac{1}{8}$  sol for a  $\frac{1}{8}$  rest at the terminus of the triad. In all other respects there is complete identity.

The similarity does not stop with this single bar, but traces of the Schultz figure are found in other bars of "The Blacksmith Blues."

By way of further example, plaintiff compares bar 1 of "Good Old Army" (Pl. Exh. 2, Exh. Bk. 1), bar 9 of "Waitin' For My Baby" (Pl. Exh. 5, Exh. Bk. 7), and bar 5 of "The

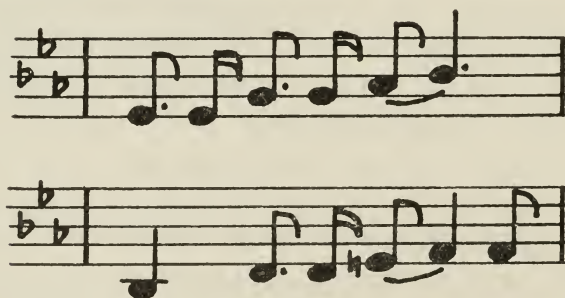


Blacksmith Blues" (Pl. Exh. 8, Exh. Bk. 14) in downward descending order.



In all three bars, plaintiff notes that the do-mi-sol triad with the passing note uses the identical timing 3/16: 1/16: 3/16: 1/16: 1/8: 3/8. The only difference in "The Blacksmith Blues" is that the passing note of "The Blacksmith Blues" is a fe instead of a fa, and that the entire bar has been modulated or dropped a fourth of an octave (R. 203).

Another trace closely linking "The Blacksmith Blues" with the Schultz figure is found in the comparison of bar 9 of "Waitin' For My Baby" with bar 13 of "The Blacksmith Blues" as shown below.



The documents, thus speaking for themselves, show the peculiar timing for the mi and the passing note portions of

the triad, as well as a peculiar slur between the passing note portion and the sol portion. Plaintiff also notes that the mi portion of the triad occupies precisely the same location in "The Blacksmith Blues" bar 13 that it does in the Schultz figure of bar 9; that the passing note portion bears precisely the same position in the bar; that the slur occupies precisely the same position; and that the sol portion occupies precisely the same position in the bar.

A further similarity between the two songs is that the Schultz figure is used, with variations, in all of the statement portions of "Good Old Army" and "Waitin' For My Baby," and that in "The Blacksmith Blues" the do-mi-sol triad is likewise used in all of the statement portions of the music (R. 243-244, 246-247).

*The Common Peculiarities Are Not Found in the  
Prior Art in the Public Domain*

The experts for defendants were unable to produce any prior publications of any kind of music even closely approaching the peculiar similarities between the Schultz figure and the putative infringements.

One of the experts was George G. Schneider who has been employed in the plagiarism field for 27½ years and has been engaged in music research a total of 30 years (R. 149-150). Dr. Schneider made a comparative chart of representative bars from public domain sources (Def. Exh. D, Exh. Bk. 30, R. 159, 160). Dr. Schneider has one of the most extensive private music libraries in the United States (R. 172).

On cross examination, Dr. Schneider's attention was called to the 3/16 : 1/16 combination for the do portion of the triad found in common in "Good Old Army," "Waitin' For My Baby" and "The Blacksmith Blues", and he was

then asked the following question and gave the following answer (R. 177):

“Q. Now, do you know of any piece of sheet music having the do-mi-sol triad in which the do part of the triad comprises, as written and as played, both an E-flat dotted eighth and an E-flat sixteenth note?

A. I do not know offhand, no, sir.”

Dr. Schneider’s attention was next called to the 3/16 : 1/16 combination for the mi portion of the triad found in common in all three compositions, after which he was asked the following question and gave the following answer (R. 177):

“Q. Now, in a do-mi-sol triad—I am using it as you and I have used it in our examination so far—are you aware of any prior art music in which there appear for the mi part of the triad a specific combination of a G-dotted eighth and a G-sixteenth note?

A. Offhand, I do not.”

Inspection of the prior art public domain material supplied by Dr. Schneider makes clear that the prior publications are equally deficient in the passing note having a  $\frac{1}{8}$  value, whether it be fa or fe, and that they are equally deficient in supplying the sol component in the final  $\frac{3}{8}$  of the bar.

Defendants’ other expert, David Raksin, is a composer, conductor, orchestrator, arranger, researcher and lecturer (R. 205). He also was unable to find in any of the prior art publications the note time values found in common in the Schultz figure and the putative infringements. He explained the deficiencies of the prior art as follows (R. 259):

“Let me say ‘oeuf’ and ‘enough,’ or ‘huff’ and ‘enough.’ Huff is spelled h-u-f-f. Enough is spelled e-n-o-u-g-h. And I defy anybody to tell the difference between ‘oeuf’ and ‘huff’ and ‘o-u-g-h’ and ‘enough.’



They are the same thing. And o-e-u-f is French, oeuf, ough as we say it. These are the same things."

But in the case at bar, he was unable to find in any of the prior usage the peculiar musical spelling the same as that which is now found in common in the plaintiff's and defendants' works.

Mr. Raksin was aided in his deliberations by a chart prepared by Harold Barlow (R. 228, Def. Exh. E, Exh. Bk. 31-37). This exhibit likewise on its face fails to disclose any prior art examples having the precise and peculiar timing of the Schultz figure and the putative infringements.

*The Law Accepts Proof of Common Peculiarities  
as Proof of Copying*

Under the foregoing circumstances, plaintiff submits that "The Blacksmith Blues," speaking for itself, demonstrates that its peculiar do-mi-sol triad must have been copied from the Schultz figure—for there is no other source for the figure. The Schultz figure alone discloses so many peculiarities found in common with the putative infringements. The combination of these circumstances spells actual copying rather than independent composition. Plaintiff's form of musical spelling is peculiar to the Schultz figure and to the putative infringement and is wholly lacking in the prior art found in the public domain.

Plaintiff applies the principle set forth in *Castle v. Bullard* (1860), 23 How. (64 U.S.) 172. In that case, certain evidence on a particular issue was circumstantial, and the Court laid down the rule to be applied as follows, page 187:

"\* \* \* Much of the evidence was of a circumstantial character; and it is not going too far to say, that some of the circumstances adduced, if taken separately, might well have been excluded. Actions of this descrip-

tion, however, where fraud is of the essence of the charge, necessarily give rise to a wide range of investigation, for the reason that the intent of the defendant is, more or less, involved in the issue. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances, as the means of ascertaining the truth. Great latitude, says Mr. Starkie, is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but of supplying an invaluable protection against imposition. 1 Stark, Ev., p. 58.

“Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the grounds of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. \* \* \*”

In *The Robert Edwards* (1821), 6 Wheat. (19 U.S.) 187, the Court said, page 190:

“\* \* \* we are not to shut our eyes on circumstances, which sometimes carry with them a conviction, which the most positive testimony will sometimes fail to produce. \* \* \*”

*Rogers v. Missouri Pacific Railroad Company* (1957), 352 U.S. 500, states, footnote 17:

“Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.”

The application of the rule in proving identity has been stated as follows:

“The process of constructing an inference of Identity thus consists usually in adding together a number of circumstances, each of which by itself might be a feature of many objects, but all of which together make it more probable that they coexist in a single object only. Each additional circumstance reduces the chances of there being more than one object so associated. The process thus corresponds accurately to the principle of Relevancy (citation omitted).”

II *Wigmore on Evidence* 386, sec. 411.

The circumstantial evidence rule is applied with consistent regularity in copyright infringement cases, as appears from the following quotations:

“\* \* \* you cannot have better evidence of such copying than the circumstance which occurs in several of the passages here complained of—namely, the fact of blunders in the original book being transferred into the book accused of piracy.”

*Mawman v. Tegg* (1826), 2 Russ. 385, 394, 38 Eng. Rep. 380, 384.

“Upon the question of infringement there is not much room for doubt. The theme or melody of the music is substantially the same in the copyrighted and the alleged infringing pieces. The measure of the former is followed in the latter, and is somewhat peculiar. When played by a competent musician, they appear to be really the same. There are variations, but they are so placed as to indicate that the former was taken deliberately, rather than that the latter was a new piece.”

*Blume v. Spear* (S.D.N.Y. 1887), 30 Fed. 629, 631.

“In a case like this, when a close resemblance is the necessary consequence of the use of common materials,

the existence of the same errors in the two publications affords one of the surest tests of copying. The improbability that both compilers would have made the same mistakes, if both had derived their information from independent sources, suggests such a cogent presumption of copying by the later compiler from the first that it can be overcome only by clear evidence to the contrary." (Citations omitted.)

*List Pub. Co. v. Keller* (S.D.N.Y. 1887), 30 Fed. 772, 774.

"\* \* \* The record discloses no \* \* \* evidence \* \* \* that the similarity of defendants' to complainant's articles was due to their both having been derived from common sources, \* \* \* much less supported by any evidence. \* \* \*"

*Werner v. Encyclopaedia Britannica Co.* (3rd Cir. 1905), 134 Fed. 831, 832.

"We think that the proof of a considerable number of errors common to both publications occurring first in the complainant's and none occurring first in the defendant's created a prima facie case of copying by the defendant which it was bound to explain."

*Frank Shepard Co. v. Zachary P. Taylor Pub. Co.* (2nd Cir. 1912), 193 Fed. 991, 993.

"\* \* \* If characters, incidents, omissions, or additions are found in the complainant's dramatization, not found in the published book or common source, then, in the absence of a convincing explanation, the court is justified in finding, and invariably does find, the complainant's work has been infringed. (citations omitted)."

*O'Neill v. General Film Co.* (1915), 152 N.Y.S. 599, 602; affirmed in part and modified on other grounds *O'Neill v. General Film Co.* (1916), 157 N.Y.S. 1028.



"In deciding the question of infringement, the first and most obvious thing to do is to compare the productions themselves. The copyrightable feature of appellant's production being a particular plan, arrangement, and combination of similar materials, found in appellee's production, not only suggests, but establishes, the claim of copying."

*Edwards & Deutsch Lithographing Co. v. Boorman*  
(7th Cir. 1926), 15 F.2d 35, 36.

"\* \* \* In view of the great improbability of two workers finding the same needle in a wordy haystack, as well as other equally striking coincidences and some unmistakable improprieties, we conclude that defendant's annotator at the very least derived considerable assistance from the mental labors of his rival. \* \* \*"

*W. H. Anderson Co. v. Baldwin Law Pub. Co.* (6th Cir. 1928), 27 F.2d 82, 87.

"From the entire record, we can find no possible explanation of the mistakes common to both maps, particularly those which do not appear on defendants' alleged base maps, except direct copying."

*General Drafting Co. v. Andrews* (2nd Cir. 1930), 37 F.2d 54, 57.

"\* \* \* the charge of infringement does not fail merely because the infringer is not caught in the act, for access may be inferred or found circumstantially from the plan, the arrangement, and the combination of materials contained in the composition. \* \* \* Internal proof of access may rest in an identity of words or in the parallel character of incidents or in a striking similarity which passes the bounds of mere accident."

*Wilkie v. Santly Bros.* (2nd Cir. 1937), 91 F.2d 978, 979.

“\* \* \* Hartfield has brought to our attention phrases, sequences, singularities and errors which appear in his 1912 code and, so far as the record indicates, have appeared nowhere else, and has shown that they have been reproduced in Peterson’s 1929 publication. This shows an infringement not only of these passages as a part of Hartfield’s code but of Hartfield’s compilation as a whole which cannot be invaded by the appropriation of any material part of it.”

*Hartfield v. Peterson* (2nd Cir. 1937), 91 F.2d 998, 1000.

“\* \* \* It is unbelievable that the complete identity of choice was a matter of coincidence. \* \* \*”

*College Entrance Book Co., Inc. v. Amsco Book Co.* (2nd Cir. 1941), 119 F.2d 874, 875.

“\* \* \* a case could occur in which the similarities were so striking that we would reverse a finding of no access, despite weak evidence of access (or no evidence thereof other than the similarities); \* \* \*.”

*Arnstein v. Porter* (2nd Cir. 1946), 154 F.2d 464, 469.

“The accused song bears the kind of similarity to plaintiff’s song which, by standards set up by the Court of Appeals of this Circuit indicates internal evidence of copying even in the absence of proof of access. \* \* \*”

*Baron v. Leo Feist, Inc.* (S.D.N.Y. 1948), 78 F. Supp. 686, 689, aff’d. (2d Cir. 1949) 173 F.2d 288.

“\* \* \* Some of them (the words) are so unusual that we cannot believe the similarity was merely the result of chance.”

*Wihtol v. Wells* (7th Cir. 1956), 231 F.2d 550, 552.

“\* \* \* There was no direct evidence that defendant Kaczmarek had access to plaintiffs’ song, but the charge of infringing does not fail merely because the infringer was not caught in the act for access may be inferred, or found circumstantially. \* \* \*”

*Cholvin v. B. & F. Music Co.* (7th Cir. 1958), 253 F.2d 102, 103.

*The Foregoing Law Is Particularly  
Pertinent in this Case.*

In this case we have already discussed the several common elements which are found in plaintiff’s and defendants’ works and which are not found in the prior art musical compositions available in the public domain. A recapitulation of the several similarities in the light of the foregoing authorities makes it unbelievable that the complete identity of choice in these several peculiarities was a matter of coincidence. Some of the peculiarities are so unusual that the similarity could not have been merely the result of chance. We call the attention of the Court particularly to the following:

*First:* In bars 1, 3, 5, 7, 11 and 15 of “The Blacksmith Blues,” a  $3/16$  (dotted one-eighth) *do* occupies the first  $3/4$  of the first beat of the bar. This same concept is found earlier in bars 1, 2, 9, 10, 25 and 26 of “Good Old Army” and bars 1, 2, 9, 25 and 26 of “Waitin’ For My Baby.” This is a total of six precise  $3/16$  *do* component positions and timings.

*Second:* In bars 1, 3, 5, 7, 11 and 15 of “The Blacksmith Blues,” a  $1/16$  *do* occupies the last  $1/4$  of the first beat of the bar. This same concept is found earlier in bars 1, 2, 9, 10, 25 and 26 of “Good Old Army” and in bars 1, 9 and 25 of “Waitin’ For My Baby.” This is a total of six precise  $1/16$  *do* component positions and timings.

*Third:* In bars 1, 3, 5, 7, 9, 11, 13 and 15 of “The Blacksmith Blues,” a  $3/16$  (dotted one-eighth) *mi* occupies the

first  $\frac{3}{4}$  of the second beat of the bar. This same concept is found earlier in bars 1 and 2 of "Good Old Army" and in bars 1, 9 and 25 of "Waitin' For My Baby." This is a total of eight precise  $\frac{3}{16}$  *mi* component positions and timings.

*Fourth:* In bars 1, 3, 5, 9, 11 and 13 of "The Blacksmith Blues," a  $\frac{1}{16}$  *mi* occupies the final  $\frac{1}{4}$  of the second beat of the bar. This same concept is found earlier in bars 1 and 2 of "Good Old Army" and bars 1, 9 and 25 of "Waitin' For My Baby." This is a total of six precise  $\frac{1}{16}$  *mi* component positions and timings.

*Fifth:* In bars 1, 3, 5, 9, 11 and 13 of "The Blacksmith Blues," a  $\frac{1}{8}$  *passing note* (fe) occupies the first half of the third beat of the bar. This same concept is found earlier in the passing note (fa) of bars 1 and 2 of "Good Old Army" and bars 1, 9 and 25 of "Waitin' For My Baby." This is a total of six precise  $\frac{1}{8}$  *passing note* component positions and timings.

*Sixth:* In bar 13 of "The Blacksmith Blues," a *slur* connects the passing note component with the sol component and ties together the first half and the second half of the third beat of the bar. This same concept is found earlier in bar 9 of "Waitin' For My Baby." This is one precise *slur* component position.

*Seventh:* In bars 1, 9 and 13 of "The Blacksmith Blues," a  $\frac{1}{4}$  *sol* occupies the last half of the third beat and the first half of the fourth beat of the bar. This same concept is found earlier in bar 26 of "Good Old Army" and in bars 1, 9 and 25 of "Waitin' For My Baby." This is a total of three precise  $\frac{1}{4}$  *sol* component positions and timings.

*Eighth:* In bar 5 of "The Blacksmith Blues," a  $\frac{3}{8}$  (dotted  $\frac{1}{4}$ ) *sol* occupies the last half of the third beat and the entire fourth beat of the bar. This same concept is found earlier in bars 1 and 2 of "Good Old Army." This is one precise  $\frac{3}{8}$  *sol* component position and timing.



*Ninth:* In bar 1 of "The Blacksmith Blues," the *syncopation* of the entire bar is exactly  $3/16: 1/16: 3/16: 1/16: 1/8: 1/4: 1/8$ . The same syncopation is found earlier in bars 1 and 25 of "Waitin' For My Baby." This is one instance of complete bar precise *syncopation*.

*Tenth:* In bar 5 of "The Blacksmith Blues," the *syncopation* of the entire bar is exactly  $3/16: 1/16: 3/16: 1/16: 1/8: 3/8$ . The same exact syncopation is found earlier in bars 1 and 2 of "Good Old Army" and in bar 9 of "Waitin' For My Baby." This is one instance of complete bar precise *syncopation*.

*Eleventh:* In "The Blacksmith Blues," the triad is used repetitively for each *statement* of the song. The same concept is found earlier in "Good Old Army."

In recapitulation, if each of the foregoing common points be weighted evenly as a factor, bars 1 and 5 of "The Blacksmith Blues" each has seven factors in common with plaintiff's music; bars 3, 11 and 13 of "The Blacksmith Blues" each has five factors in common; bar 9 has four factors in common; and bars 7 and 15 each has three factors in common, for a total of 39 common factors, 36 of which are common notes. When one considers that "The Blacksmith Blues" has only 103 notes (R. 235), this is a concordance of 34.9% in note positioning and timing alone.

Plaintiff, therefore, submits that access and actual copying are provable and have been proved in this case by the internal evidence in the defendants' music itself.

#### **Finding 5 Is Clearly Erroneous.**

Finding 5 recites:

"5. Jack Holmes composed the words and music of the original musical compositions entitled 'Happy Pay Off Day' and 'The Blacksmith Blues.' Certificates of copyright on said 'Happy Pay Off Day' and 'The Black-

smith Blues' were applied for and issued by the United States Register of Copyrights." (R. 56)

In considering this finding, plaintiff has made two specifications of error:

"3. The District Court erred in finding that Jack Holmes composed the music of the compositions entitled 'Happy Pay Off Day' and 'The Blacksmith Blues.'

"4. The District Court erred in finding that the musical compositions 'Happy Pay Off Day' and 'The Blacksmith Blues' were original with Jack Holmes."

With respect to specification 3, there is no evidence that Jack Holmes composed the music. As a matter of fact, defendants introduced no evidence whatsoever concerning the composership of the defendants' works. The mere statement "Words and Music by Jack Holmes" appearing upon the sheet music of "The Blacksmith Blues" (Pl. Exh. 8, Exh. Bk. 13, 14), as well as words of similar import appearing upon other alleged infringements, should have no probative effect upon the question of composership. This is particularly true in view of the circumstantial evidence that the Schultz figure was copied in producing the defendants' alleged infringing music.

By the same token, there is no evidence that the musical compositions were "original" with Jack Holmes as recited in said Finding 5.

#### **Finding 6 Is Clearly Erroneous.**

Finding 6 recites:

"6. Defendants herein, other than Jack Holmes, originally named as defendant, are licensees and/or assignees of certain rights to publish, publicly perform for profit, record and distribute phonograph recordings of, and otherwise exploit, said 'Happy Pay Off Day' and 'The Blacksmith Blues.'" (R. 56)

Specification of error 5 directed to this finding recites:

"5. The District Court erred in finding defendants herein, other than Jack Holmes, originally named as a defendant, are licensees and/or assignees of certain rights to publish, publicly perform for profit, record and distribute phonograph recordings of, and otherwise exploit, said 'Happy Pay Off Day' and 'The Blacksmith Blues.'"

Finding 6 is without record support. There is of record no license or assignment from plaintiff granting defendants the right to publish the putative infringing music, nor is there any license or assignment from anyone else claiming under the plaintiff. This finding is, therefore, without record support and hence is clearly erroneous.

**Findings 10, 11, 12 (First Part), 17 and 18 Are Clearly Erroneous.**

The foregoing findings may be considered as a group, insofar as the same considerations apply to each of them. They recite (R. 57 to 59):

"10. Plaintiff did not submit a copy of her compositions, or either of them, to Jack Holmes or to defendants, or any of them, prior to Jack Holmes' composition of 'Happy Pay Off Day' and 'The Blacksmith Blues,' as aforesaid.

"11. It is not true that Jack Holmes, or defendants, or any of them, had ever seen a copy, or heard a performance of plaintiff's compositions, or either of them, or in any other way were aware of the existence of plaintiff's composition prior to Jack Holmes' composition of 'Happy Pay Off Day' and 'The Blacksmith Blues,' as aforesaid.

"12 The first measure of 'Happy Pay Off Day' and of 'The Blacksmith Blues' utilizes some notes in common with the notes of the opening measures of 'Good Old Army' and 'Waitin' For My Baby'; insofar as such musical material in 'Happy Pay Off Day' and

'The Blacksmith Blues' bears any similarity to 'Good Old Army' or 'Waitin' For My Baby,' such musical material was not copied or prepared from plaintiff's compositions. \* \* \*

"17. Neither all of 'Happy Pay Off Day' or 'The Blacksmith Blues,' nor any part thereof, was copied or prepared from 'Good Old Army' or 'Waitin' For My Baby,' or any part thereof.

"18. It is not true that Jack Holmes or defendants, or any of them, have used the results of plaintiff's labors and incorporated the results thereof in 'Happy Pay Off Day' or 'The Blacksmith Blues' by the publishing, selling, and otherwise marketing of said compositions."

The specifications of error directed to the foregoing findings recite:

"6. The District Court erred in finding that plaintiff did not submit a copy of her compositions, or either of them, to Jack Holmes or to defendants, or any of them, prior to Jack Holmes' composition of 'Happy Pay Off Day' and 'The Blacksmith Blues,' as aforesaid.

"7. The District Court erred in finding that it is not true that Jack Holmes, or defendants, or any of them, had ever seen a copy, or heard a performance of plaintiff's compositions, or either of them or in any other way were aware of the existence of plaintiff's compositions prior to Jack Holmes' composition of 'Happy Pay Off Day' and 'The Blacksmith Blues,' as aforesaid.

"8. The District Court erred in failing to find that plaintiff did disseminate her musical composition widely for purposes of consideration among musicians, arrangers, publishers and others in the musical industry.

"9. The District Court erred in failing to find that defendants, and each of them, received copies of her musical composition.

"10. The District Court erred in finding that insofar as musical material in 'Happy Pay Off Day' and 'The Blacksmith Blues' bears any similarity to 'Good Old Army' or 'Waitin' For My Baby,' such musical material was not copied or prepared from plaintiff's compositions.

"15. The District Court erred in finding that neither all of 'Happy Pay Off Day' or 'The Blacksmith Blues,' nor any part thereof, was copied or prepared from 'Good Old Army' or 'Waitin' For My Baby,' or any part thereof.

"16. The District Court erred in finding that it is not true that Jack Holmes or defendants, or any of them, have used the results of plaintiff's labors and incorporated the results thereof in 'Happy Pay Off Day' or 'The Blacksmith Blues,' by the publishing, selling, and otherwise marketing of said compositions.

"17. The District Court erred in failing to find that Jack Holmes, alias Charles Douglas Hone, copied from plaintiff's copyrighted compositions 'Good Old Army' or 'Waitin' For My Baby' or from both of them when he wrote the music of the musical compositions entitled 'Happy Pay Off Day' and 'The Blacksmith Blues.'

"18. The District Court erred in failing to find that defendants, and each of them, used the results of plaintiff's labors and incorporated such results in the infringing musical compositions 'Happy Pay Off Day' and 'The Blacksmith Blues.'"

Plaintiff submits that each of the foregoing findings is clearly erroneous, because each is based upon a misconception of the law of circumstantial evidence as to copying, which improperly placed upon plaintiff the burden of the evidence.

The District Court was apparently of the view that direct evidence of submission was essential in order to prove copying. Plaintiff submits that the evidence showing exten-



sive promotion of plaintiff's music in the California area coupled with the internal evidence of copying is sufficient to dispense with proof of actual submission. As stated in *Arnstein v. Porter* (2nd Cir. 1946), 154 F.2d 464, 469:

“\* \* \* a case could occur in which the similarities were so striking that we would reverse a finding of no access, despite weak evidence of access (or no evidence thereof other than the similarities); \* \* \*”

Or as stated otherwise in *Wilkie v. Santly Bros.* (2nd Cir. 1937), 91 F.2d 978, 979:

“\* \* \* the charge of infringement does not fail merely because the infringer is not caught in the act, for access may be inferred or found circumstantially from the plan, the arrangement, and the combination of materials contained in the composition. \* \* \*”

In this case, defendants have made no explanation concerning the similarity of materials. Plaintiff submits that defendants had the burden of proof on this issue in view of the striking similarity between the Schultz figure and the putative infringements. The rule as to the burden of evidence is stated in *Frank Shepard Co. v. Zachary P. Taylor Pub. Co.* (2nd Cir. 1912), 193 Fed. 991, 993:

“The burden of proof, it is true, was on the complainant throughout, but on this state of the case the burden of evidence—that is, of explanation—was on the defendant.”

And in the case at bar, plaintiff submits that the trial court erred as a matter of law in finding no submission and no copying. In view of the opportunity of access and in view of the similarities, proper application of the rule on circumstantial evidence and burden of evidence would have resulted in contrary findings.

### **Finding 12 (Last Part) Is Clearly Erroneous.**

The last part of finding 12 recites (R. 58) :

"12. \* \* \* The common utilization by different compositions of a few notes such as herein found to exist occurs frequently in the field of popular music, particularly because of the limited number of pleasing tonal combinations within the average person's range of voice and skill."

Specification 11 recites :

"11. The District Court erred in finding that the common utilization by different compositions of a few notes such as herein found to exist occurs frequently in the field of popular music, particularly because of the limited number of pleasing tonal combinations within the average person's range of voice and skill."

Plaintiff submits that there is no evidence in support of this part of finding 12. It has been shown above that the precise combination of the Schultz figure and the peculiarities found in common with the Schultz figure and the putative infringement are not found in any of the prior art public domain sources. This, notwithstanding the combined efforts of Dr. George G. Schneider, David Raksin and Howard Barlow. Notwithstanding the plethora of prior art domi-sol triads found in the public domain, not a one showed the common utilization of the notes herein found to exist. Not having appeared a single time, it cannot be said that such a similarity "occurs frequently in the field of popular music."

### **Findings 14, 15 and 16 Are Clearly Erroneous.**

Findings 14, 15 and 16 recite (R. 59) :

"14. Because of these differences [those specified in finding 13], the first measures of the respective compositions of plaintiff and Holmes, when performed,

convey to the average listener, as well as to a person skilled in music, a substantially different musical sound, feeling and impression.

"15. The construction, modulations, phrasing, musical notes, and other musical material contained in 'Happy Pay Off Day' and 'The Blacksmith Blues' are not similar to that of 'Good Old Army' and 'Waitin' For My Baby.'

"16. A performance of either 'Good Old Army' or 'Waitin' For My Baby' does not convey or give an impression to the average listener, of similarity or resemblance to 'Happy Pay Off Day' or 'The Blacksmith Blues,' in any particular or taken as a whole."

The specifications of error directed to these findings recite:

"12. The District Court erred in finding that, because of differences set forth in Finding 13, the first measure of the respective compositions of plaintiff and Holmes, when performed, convey to the average listener, as well as to a person skilled in music, a substantially different musical sound, feeling and impression.

"13. The District Court erred in finding that the construction, modulations, phrasing, musical notes, and other musical material contained in 'Happy Pay Off Day' and 'The Blacksmith Blues' are not similar to that of 'Good Old Army' and 'Waitin' For My Baby.'

"14. The District Court erred in finding that a performance of either 'Good Old Army' or 'Waitin' For My Baby' does not convey or give an impression to the average listener, of similarity or resemblance to 'Happy Pay Off Day' or 'The Blacksmith Blues,' in any particular or taken as a whole [whole]."

It is true as stated in finding 13 that there is a slight difference in pitch in the passing note, the Schultz figure using a fa and "The Blacksmith Blues" using a fe. But finding 14 fails to recognize that the passing notes are of

precisely the same length and are in precisely the same location in the bar.

It is also true that the Schultz figure contains a rest on the last half of the final count of the first measure in "Waitin' For My Baby." But finding 14 fails to recognize that the sol portion of the triad occupies the final  $\frac{3}{8}$  of the measure in bars 1 and 2 of "Good Old Army" in precisely the same manner as it does later in bar 5 of "The Blacksmith Blues", save for a modulation in the pitch of the entire bar.

The undisputed documentary evidence shows the substantial similarity in notes of the Schultz figure and the putative infringements in at least 36 particulars. Since the note placement and timing is identical with the exception of the minor variations in the precise pitch of the passing note and the use of the last  $\frac{1}{8}$  of the measure, it is submitted that the "not similar" thought of finding 15 and the "in any particular" portion of finding 16 must fail both as a matter of law and as lacking in evidentiary support.

In making the findings the Court was guided in part by evidence which included a measure-by-measure playing of the two pieces (R. 206-219). The defendants' experts did not play any of the music through in its entirety as a whole. The "taken as a whole" portion of finding 16 is, therefore, entirely without evidentiary support.

Each of the foregoing findings is based upon the premise that the defendants' music does not copy the plaintiff's music as a whole, the only similarity being in the use of the Schultz figure. In this, the District Court erred as a matter of law.

With respect to the use of the Schultz figure rather than the entire musical composition, plaintiff refers to the authorities set forth at pp. 29-33 of this brief. In addition,

plaintiff calls the attention of the Court to U. S. Code, Title 17, Section 3, the pertinent portion of which recites:

“The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. \* \* \*”

As this Court has said of a burlesque in *Benny v. Loew's Incorporated* (9th Cir. 1956), 239 F.2d 532, 537; aff'd. (1958), 356 U.S. 43:

“\* \* \* One cannot copy the substance of another's work without infringing his copyright. \* \* \*”

If the foregoing rule applies to the burlesque of an original work, certainly it should apply to the slight variation of notes found in the case at bar.

That a copyrightable component part of a musical theme includes the repetitious use of a single bar of music is made clear from *Fred Fisher, Inc. v. Dillingham* (S.D.N.Y. 1924), 298 Fed. 145 in which the infringement consisted entirely in the repetitious use of a single bar of the copyrighted work. At page 148, Judge Learned Hand, while still on the district bench, said:

“\* \* \* Musical melody is single, the sense of the earlier notes carrying over into those which succeed. Repetition is in substance the same in this respect, the effect upon the ear being entirely different when the figure is rolled over and over again. \* \* \*”

The notes of the figure before the Court in the *Fred Fisher* case are not shown in the reported decision. However, plaintiff invites the attention of the Court to *Musical Copyright* by Shafter, page 168. There the copyrighted figure and the putative infringement are shown side by side.

Plaintiff submits that there is greater similarity between



the figures in this case than there was in the *Fred Fisher* case.

Indeed, the differences between the Schultz figure and the putative infringing bars are so slight as to make applicable the thought of *Blume v. Spear* (S.D.N.Y. 1887), 30 Fed. 629, 631:

“\* \* \* There are variations, but they are so placed as to indicate that the former was taken deliberately, rather than that the latter was a new piece.”

The same principle was applied to the lifting of but 57 scenes comprising only 20% of an entire feature in *Universal Pictures Co. v. Harold Lloyd Corporation* (9th Cir. 1947), 162 F.2d 354, where Judge Stephens in speaking for the Court, said at page 361:

“The whole picture need not be copied to constitute infringement. The mere copying of a major sequence is sufficient. \* \* \*”

And so in the case at bar, the Schultz figure comprises a major sequence of both the Schultz music and the putative infringements. If the 20% usage of *Universal* is sufficient then it follows that the 34.9% in the case at bar should be sufficient.

The foregoing rule is not singular to this circuit. For example, in *King Features Syndicate v. Fleischer* (2nd Cir. 1924), 299 Fed. 533 the Court said, page 535:

“\* \* \* Copying is not confined to a literary repetition, but includes various modes in which the matter of any publication may be adopted, imitated, or transferred with more or less colorable alteration. The disguise of the source from which the material was derived does not defeat the protection of the copyright, nor does taking a part of the work constitute an evasion of the copyright. (citation omitted). The appellees did not take all of the copyrighted matter, or all its principal

characters, but took one, the idea of the horse 'Sparky.' "

Or, as stated otherwise in *Chicago Record-Herald Co. v. Tribune Ass'n.* (7th Cir. 1921), 275 Fed. 797, 799:

"\* \* \* the transgression in its unauthorized appropriation is not to be neutralized on the plea that 'it is such a little one.' "

**The District Court Should Have Entered Judgment of Infringement and Awarded an Accounting of Damages and Profits.**

The ultimate errors specified in the decision below are (R. 313, 317-318):

"1. The District Court erred in ordering, adjudging and decreeing that plaintiff, Mildred Becker Schultz, take nothing by her amended complaint herein.

"2. The District Court erred in ordering, adjudging and decreeing that defendants have judgment for their costs of suit.

"19. The District Court erred in concluding that neither of the compositions, 'Happy Pay Off Day' nor 'The Blacksmith Blues,' are infringements upon plaintiff's compositions 'Good Old Army' or 'Waitin' For My Baby.'

"20. The District Court erred in failing to conclude that the compositions 'Happy Pay Off Day' and 'The Blacksmith Blues' are both infringements upon plaintiff's compositions 'Good Old Army' and 'Waitin' For My Baby.'

"21. The District Court erred in concluding defendants herein are not guilty of having engaged in unfair trade practices or unfair competition by their having published, sold, and otherwise marketed the compositions, 'Happy Pay Off Day' and 'The Blacksmith Blues.'

"22. The District Court erred in concluding that defendants are entitled to judgment herein for their costs of suit incurred herein.

"23. The District Court erred in failing to find that plaintiff is entitled to judgment as prayed in the Amended Complaint filed March 18, 1955."

Plaintiff has shown above:

1. that there was an ample opportunity for defendants to copy plaintiff's music;
2. that the documents themselves show internal evidence of copying;
3. that the public domain materials do not disclose the peculiar similarities between the Schultz figure and the putative infringements; and
4. that the putative infringements are a substantial use of the Schultz figure.

As a consequence, under the cases cited, plaintiff submits that the conclusions of law are in error and that plaintiff was entitled to judgment under U.S. Code, Title 17, Section 101 for injunctive relief, for damages and profits, and for other remedies.

### **CONCLUSION**

In conclusion, plaintiff asks that the judgment of the District Court be reversed and that the District Court be directed to enter judgment for plaintiff.

Respectfully submitted,

CARL HOPPE

THOMAS P. MAHONEY

JAMES F. MITCHELL

*Attorneys for Appellant*









## Appendix

Plaintiff's Exhibit No.	Description	Record Page No.			Printed Exhibit B
		Identified	Offered	Received	
1	Certificate of Copyright, Registration No. E 254497, dated April 7, 1941, "Good Old Army"	72	72	76	
2	Copy of words and music, entitled "Good Old Army", bearing Library of Congress Copyright Deposit stamp	72	72	76	1
3	Sheet Music entitled "Good Old Army"	73	90	90	3
4	Certificate of Copyright, Registration No. E 172341, dated July 7, 1949, "Waitin' For My Baby"	73	73	76	
5	Copy of words and music entitled "Waitin' For My Baby" bearing Library of Congress Copyright Deposit stamp	73	73	76	7
6	Sheet music entitled "Waitin' For My Baby"	73	108	109	9
7	Photostatic copy of Exhibit 6	73-74	108	109	
8	Sheet music entitled "Blacksmith Blues" published by Hill and Range Songs, Inc.	74	74	76	13
9	"Happy Pay Off Day" by Mickey Katz, Capitol record No. 5576-Y	74	74	76	
10	"Happy Pay Day" by Sonny Burke, Decca record No. 27045	74	74	76	
11	"The Blacksmith Blues", by Ella Mae Morse, Capitol record No. 1693	74	74	76	
12	Publishing Agreement and Royalty Contract dated May 29, 1943 by and between Mildred Becker and Westmore Music Corporation	146	147	148	17
13	Carbon copy of Exhibit 12	146	147	148	
14	Letter from Stephen Janik to Mildred Becker	146	147	148	18
15	Letter dated Nov. 2, 1949 from Lou Levy to Mildred Becker Schultz	146	147	148	19

Plaintiff's Exhibit No.	Description	Record Page No.			Prim Exhibi
		Identified	Offered	Received	
16	Sheet music entitled "Happy Pay Off Day" published by Tune Towne Tunes	186	186	186	2
17	Certificate of Copyright Registration No. 191310, dated January 25, 1950 to Charles Douglass Hone on "Happy Pay Off Day"	302	302	303	
18	Certificate of Copyright No. 45529, dated April 17, 1950 covering "Happy Pay Off Day"	302	302	303	
Defendants'					
Exhibit No.					
A	Envelope addressed to Schumann Music Publishing Company	128			
B	Document having three bars of music thereon	143	145	145	
C	Comparison chart of thematic material of "Happy Pay Off Day", "The Blacksmith Blues", "Good Old Army", and "Waitin' For My Baby"	151	160	160	2
D	Comparison chart of "Good Old Army" and prior art themes	159	160	160	3
E	Comparison charts of prior art musical phrases used in David Raksin testimony	223	234	234	3
F	Cover page and page one of "36 Transcendantes" by Theo Charlier	238			3
G	Letter dated November 17, 1952 from George White to Hill and Range Songs, Inc.	278	285	285	
H	Letter dated March 12, 1953 from George White to Hill and Range Songs, Capitol Records, and Tune Towne Tunes	281	285	285	
I	Letter dated December 4, 1952 from Capitol Records to George White	282	285	285	
J	Letter dated November 20, 1952 from George White to Capitol Records	283	285	285	

Defendants' Exhibit No.	Description	Record Page No.			Printed, Exhibit Bo
		Identified	Offered	Received	
K	Letter dated March 20, 1953 from Gang, Kopp and Tyre to George White	284	285	285	
L	Letter dated March 31, 1953 from George White to Norman Tyre	285	285	285	
M	Letter dated April 20, 1953 from Norman Tyre to George White	285	285	285	
N	Letter dated April 21, 1953 from George White to Gang, Kopp and Tyre	286	286	286	
O	Letter dated May 19, 1953 from George White to Gang, Kopp and Tyre	290	290	290	
P	Letter dated May 22, 1953 from Norman Tyre to George White	292	292	292	
Q	Letter dated May 25, 1953 from George White to Gang, Kopp and Tyre	293	293	293	
R	Letter dated May 26, 1953 from Carl Hoefle to George White	295	295	295	
S	Letter dated June 1, 1953 from George White to Manuel Ruiz	295	295	295	

